



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT KISUMU

CAUSE NO. 58 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 24th November, 2014)

ISSA JOHN MUSUNGU.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENTS

JUDGMENT

The claimant herein Issa John Musungu filed his memo of claim on 25.3.2014 through the firm of D. C. Chitwa & Co. Advocates. He also gave evidence in court and his claim is that he was employed by the respondents on 1.10.2007. On 27.3.2012 the respondents interdicted him following some allegations that he had defiled an 11 year old – one Noreen. He alleges that the girl is his neighbour and clansman. On 30.3.2012 he was served with summons to appear before the respondents for the alleged complaint. On 26.4.2012 he was finally dismissed from service. It is the claimant's position that he was not charged with any criminal case. He avers that he was not terminated in accordance with the provisions of S. 44(1) (2) of the Employment Act 2007 and that the termination contravened the provisions of S. 43(1) of Employment Act. He seeks to be reinstated and be paid his salary arrears since 26.3.2012. He also wants this court to declare the termination unlawful.

The respondents on the other hand filed their response to the claim on 15.3.2014 through their advocate Cavin Anyuor. In their response the respondents also called 3 witnesses to give evidence. It is the respondent's case that in August 2011, the respondents through it's agent, the District Education Officer Emuhaya District received information that the claimant while stationed at Vunandi Primary had carnal knowledge of a minor Noreed Ebby, a standard 5 pupil at Ikungu Primary School which amounted to serious violation of the provisions of the Code of Regulations of Teachers. That the alleged act was in blatant breach of Regulation 70(2) of the Code of Regulation read together with *inter alia* the Teachers Service Commission Act Cap 212 Laws of Kenya. The respondents in compliance with the provisions of the Code of Regulations conducted preliminary investigations over the alleged allegations and recorded statements from 4 witnesses. The said witnesses's statements were filed before this court as annexures. At the School Level, the School Management Committee held a meeting on 10th February 2012 and further discussed the claimant's case. An investigation report was forwarded from Ikungu Primary School a copy of which is **App 3**.

The respondents reached a decision to interdict the claimant for material breach of the provisions of the Code of Regulations. He was interdicted on 27.3.2012. The claimant was subsequently served with an interdiction notice and given adequate opportunity to organize his defence to which he wrote a statement of defence which was duly considered by the respondents in compliance with the provisions of the Code

of Regulations and Principles of natural justice.

As provided for in the Code of Regulations, the respondents further convened it's disciplinary panel at the District Education Officers office in Sabatia on 19.4.2012 where claimant made his representations alongside other witnesses who included the girl Noreed Ebby, Stanley Paul Omusi, Rael Amati and Robert Musungu. The panel interrogated all the witnesses, evaluated both the written and oral statements presented before it, considered the defence statement of the claimant and all facts adduced during the hearing and arrived at a conclusion that the claimant was guilty of breach of the Code of Regulations and recommended that the claimant be dismissed from service. **App 5** are the Disciplinary Panel's Proceedings dated 19.4.2012.

It is the respondents case that the respondents disciplinary panel acted impartially, independently and with utmost professionalism to arrive at a fair, just and appropriate decision based on the merits of the case and evidence adduced before court. This decision of the panel was subsequently communicated to the claimant as per **App 6** dated 26.4.2012.

It is the respondents case that the claimant was dismissed on established facts of immoral behaviour and his allegations are without merit. It is also the respondents averment that the claimant's appeal was also received and duly considered and it's decision forwarded to the claimant as per **App 7** dated 10th July 2012.

The respondents further avers that it is their duty to enforce professional standards in the teaching profession so as to maintain public morality, integrity and nobility of the teaching profession and that the decision meted on the claimant was proportionate to the offence committed. The respondents thus avers that they are mandated to protect the interests of the girl child and ensure that their education is protected from persons who are out to take advantage of their tender age, vulnerability and innocence to exploit them sexually. The respondents therefore submitted that they acted above board in dismissing the claimant from it's service in the interest of girl child education.

The girl, the victim, gave her sworn evidence in court after a *voir dir* examination. She told court that at the time of the incident she was in class 5 at Ikungu Primary School and on 9.7.2011 she was going to school at 6 am. She saw the claimant standing peeping at their house. The victim passed the claimant who started following her. She turned to look. The claimant started chasing her and she ran and reached a certain stream. She was with her younger cousin who ran on. The claimant caught up with the victim and held her dress from behind and she fell down screaming. The claimant blocked her mouth and removed her clothes and defiled her. She slipt from him and ran back home. She didn't tell her father and her mother was away.

On 11.7.2011, the claimant repeated this heinous act again after accosting the girl from the bushes. She screamed and no one came to her rescue. She then ran to school and told her friends who advised her to report to her parents. She went back home in pain and slept on the chair. The following day when her mother came back, she told her what had happened. The mother reported the matter to the school headmaster who took them to the chief. The chief took them to the police station and then she was taken to the hospital. It is the girl's case that she has not yet healed to-date. She told court that this case is not fabricated. She told court that when she went to the hospital, she was found to be infected with syphilis. She told court that she went to Shiarambatsi hospital and also Mbale District hospital and also to another called Nodanya.

CW2 was the girl's mother and she told court that she came home from a funeral on 13.7.2011 night. On 14.7.2011, her daughter didn't wake up to go to school. When she asked her why, the girl said that she had been raped by John on 9.7.2011 and 11.7.2011. CW2 decided to report to school to the headmaster. She told him what had happened. He advised her that it was a police case and he even called some children who he interrogated and they confirmed seeing John the claimant following the victim. The headmaster called the chief and he advised her to go see him. The CW2 went to see the chief with her daughter and also made a report. The chief interrogated the girl and then took them to the police station. He came out with a P3 form. He then advised her to take Ebby to hospital at Esiarambatsi Health Centre

which she did. She was examined and treated. However the chief came to hospital at the time and talked to the doctor in privacy and then they told her to return Ebby's treatment book to the doctor. He tore the paper he had written in and wrote fresh notes. He then gave her 3 injections and said he will treat the girl but not examine her. He advised her to take the girl to Emuhaya District Hospital after 4 days. He didn't fill the P3 form. On 18.7.2011, she went to Emuhaya District Hospital as advised. The doctor there read the book and called the doctor at Esiarambatsi and asked him why he didn't examine the girl. The phone was on hands – free and so she heard the conversation. The doctor on other side said he was told not to. The doctor at Emuhaya re-examined her and gave her treatment. He didn't fill the P3 form advising it be returned to Esiarambatsi. As she left the hospital, she met people from the DO's Office and they asked her why the girl was not in school and she explained. They called the headmaster of Ikumu Primary School who came at 4 pm and he was questioned. She was told to return the P3 form to the police station. She said that currently the girl is still being treated. She has been treated of syphilis for a long time and at one point she couldn't walk and her mental status was even affected. She denied that her family planned this case against the claimant.

Having considered evidence of the parties and their respective submissions, the issues for determination are:-

- 1. Whether there were valid reasons to have claimant dismissed from the service.**
- 2. Whether due process was followed before claimant was dismissed.**
- 3. Whether claimant is entitled to prayers he has sought.**
- 4. What other orders this court can grant.**

On the 1st issue the Code of Regulations for teachers Regulation 66(2) states as follows:-

“Where it comes to the knowledge of the Commission or its Agent and it is alleged that a registered teacher should be removed from the register because he/she is an unsuitable person to be a teacher, on any of the following grounds. He/she:-

- (a) is not of good moral character,**
- (b) has been convicted for a criminal offence which, in the opinion of the Commission, renders him/her unfit to be a teacher,**
- (c) is guilty of infamous conduct in any professional respect,**
- (d) ---**
- (e) ---**
- (f) ---**
- (g) ---**

The Commission or the Agents will serve the teacher with notice of interdiction in the form prescribed in Schedule XXXVII.”

It is apparent that any immoral behaviour is a receptive of dismissal. For a teacher to be dismissed, there must be valid reasons pertaining at the time of the dismissal. This is in tandem with S. 43 of the Employment Act which states:-

“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the

termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

Was there any valid reason at the time to warrant the claimant being dismissed? From the evidence of the claimant, it was alleged that the claimant had been involved in an incident of defiling a school girl. The girl gave evidence at the preliminary stages of investigations at the School Management Committee. She informed court that the claimant defiled her on two occasions. Though a report was made to the police, no action was taken against the claimant. The claimant has stated that the dismissal was unjustified as he was never charged for any criminal offence. It is worth noting here that the issue of criminal charges is distinct from disciplinary processes. The issue of whether criminal charges must be preferred or commenced against an employee before disciplinary processes can be instituted against such employee has been discussed in several cases.

In the case of **Clement Mutiso Muinde V British American Insurance Company Limited (2013) Eklr, Rika J** had this to say:-

"It has been the position of this court in many of its past awards, that employers are not limited in taking out disciplinary proceedings against their employees, in the pending of criminal trials against such employees over related issues of fact. The disciplinary process with regard to Muinde did not have to wait the finalization of the criminal case. The respondent exercised its managerial prerogative correctly by its summary decision action."

In a related case of **David Kemei V Energy Regulation Commission [2013] Eklr, Rika J** also states as follows:-

"The employment disciplinary process remains an internal and private mechanism. It is not subject to the criminal process, which is a public process. It cannot be expected that employers have to wait for policemen, prosecutors and judicial officers to determine employment offences at the workplaces. Unless the contract of employment, the law governing the contract on the letter suspending or interdicting the employee clearly states that the disciplinary process is subject to the criminal one. Courts are not there to hear and determine charges of gross misconduct ---"

I do agree with my learned brother **Rika J**. The fact that the claimant did not face any criminal charges was not a bar to commencing disciplinary process against him by the respondents. It is apparent there was a valid reason which was established by the respondents and which respondents believed existed at the time to warrant claimant being dismissed.

On the 2nd issue of due process, the process envisaged is that provided under the Code of Regulations for teachers – Regulation no. 66(3), (4), (5), & (6) which states as follows:-

"(3) Process of interdiction

The Agent shall:-

(a) On receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.

(b) Where there is a Board of Governors, the Board will invite and interview the teacher except for desertion cases.

c. If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in Schedule XXXVII specifying the actual allegations

made against him/her.

d. Send a copy of interdiction notice to the Secretary Teachers Service Commission attaching all the relevant documentary evidence.

(e) Ensure that the interdicted teacher/headteacher clears and leaves the institution and the institution house (where applicable) within 48 hours upon receiving the letter of interdiction.

(4) Disciplinary Proceedings by the Commission

The Commission shall in accordance with Section 9(1) and (2) of the Act investigate, consider and determine each case of interdiction whenever it is alleged that a registered teacher should have his/her name removed from the Register.

The Commission shall:

a. inform the teacher concerned on/about the nature of the allegation made against him/her, afford that teacher adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person.

(b) act on general evidence or statements relating to the character or conduct of the teacher concerned, and shall not be bound to receive and consider only evidence admissible in a court of law; and

(c) administer oaths and may, for the purpose of dealing with any matter before it, summon any person to attend and give evidence and to produce any relevant documents.

(d) consider only those allegations that the teacher has been informed and charged with.

5. When the Commission or its Agents summons any person to attend any proceedings for the purpose of giving evidence as prescribed in Schedule XXXVIII, it will, if it thinks fit, order the payment of his/her reasonable travelling and out-of-pocket expenses payable at the rates provided under Regulation 41 (1) (d).

(6) Determination by the Commission

As a result of proceedings referred to in Regulation 66(4) above, the Commission may in accordance with the Act (L.N.No.137/1967), Section 5, determine:-

(a) that the teacher is not guilty of the allegation made against him/her and have his/her interdiction revoked.

(b) that the name of the teacher, notwithstanding that he/she is guilty of the allegations made against him/her, be not removed from the Register but he/she either be: -

(i) warned; or

(ii) suspended without pay for a period of not less than one month and not exceeding six months; or

(iii) dismissed from his/her employment; or

iv. retired in the public interest.

(c) That the teacher is guilty of the allegations made against him/her and be dismissed and his/her name be removed from the Register, and a notice of such determination be served on

the teacher.

The claimant was subjected to this process. Preliminary investigations were conducted by the School Management Committee where he attended and later by the respondents disciplinary committee. Witnesses were called and the claimant was allowed to cross examine them. A decision was then made after the hearing to interdict the claimant. All the witnesses gave evidence which was corroborative. The claimant was therefore subjected to due process and provision of S. 41 of Employment Act were complied with.

Is the claimant then entitled to prayers he has sought. I do not think the claimant is entitled to prayers he has sought. There were valid reasons levelled against him and he was taken through fair administrative action and hearing. It is therefore the finding of this court that the claimant's case has no merit and I dismiss it accordingly with costs to the respondents.

Further to this, it is the finding of this court that the other arms involved in this case failed in their duty in failing to investigate a genuine complaint reported to them including the police. This court therefore directs that the DCIO Vihiga and office of the DPP Western do investigate this case and do justice to the victim of this case. A copy of this judgment should be served on the DCIO Vihiga and the DPP Western accordingly.

HELLEN S. WASILWA

JUDGE

24/11/2014

Appearances:-

Omondi h/b Wekesa for claimant present

N/A for respondents

CC. Wamache